

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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DEC 20 2005

In the Matter of )  
 )  
Telefónica Larga Distancia )  
de Puerto Rico, Inc. )  
 )  
Petition for Expedited Declaratory Ruling )  
Regarding Section 253 of the )  
Communications Act of 1934, as amended )

Federal Communications Commission  
Office of Secretary

WCB Docket No. \_\_\_\_\_

**PETITION FOR EXPEDITED DECLARATORY RULING**

Richard Rubin  
David S. Turetsky  
Brett A. Snyder  
LeBoeuf, Lamb, Greene & MacRae LLP  
1875 Connecticut Avenue, NW  
Washington, D.C. 2000-5728  
(202) 986-8000

*Attorneys for Telefónica Larga Distancia de  
Puerto Rico, Inc.*

December 20, 2005

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## SUMMARY

Approval of Puerto Rico Telephone Company's ("PRTC") Single Zone Plan by the Puerto Rico Telecommunications Regulatory Board (the "Puerto Rico Board") will result in the elimination of the intrastate telecommunications market in Puerto Rico and, therefore constitutes a violation of Section 253(a) of the Communications Act of 1934, as amended, (the "Act") subject to preemption under Section 253(d) of the Act.. It is a simple syllogism. One, virtually all subscribers to residential local exchange service in Puerto Rico are subscribers to PRTC's residential local exchange service. Two, under the Single Zone Plan, all subscribers to PRTC's residential local exchange service will be **required** to purchase bundled local and intrastate long distance service from PRTC. Three, with virtually all subscribers to residential local exchange services committed to PRTC's mandatory bundled package, there will be no demand for intrastate long distance service from other providers, resulting in the elimination of competition in the intrastate long distance service market in Puerto Rico and, therefore, the elimination of intrastate long distance service in Puerto Rico. Approval of the Single Zone Plan by the Puerto Rico Board would be a clear violation of the prohibition against impairment of competition in intrastate telecommunications contained in Section 253(a), subject to preemption by the Commission pursuant to Section 253(d).

PRTC maintains a monopoly in the residential local exchange services market and dominance in the business local exchange services market and the intra-island long distance services market although the latter market has some elements of competition. The Single Zone Plan will crush that competition. By imposing a mandatory single calling zone subscription requirement and thereby eliminating local calling areas within

Puerto Rico, the Single Zone Plan would **force** PRTC's local exchange customers to subscribe to what is in effect a bundled package of local and intrastate long distance services. Having had its intrastate access rate reduced from nine to two cents per minute, PRTC's response to the lost windfall is to simply close down the intrastate market by eliminating all competition, keep all intrastate revenues for itself, and use them to subsidize unrelated components of PRTC's Single Zone Plan. By eliminating competition in the intrastate long distance market, co-opting all users of competitive intra-island long distance service and pocketing all of the revenues for that service, PRTC has stated that the Single Zone Plan is "revenue neutral" with respect to the totality of PRTC's services. It is apparent that with the Single Zone Plan intends to make the intra-island long distance market a victim in the process.

Thus, approval by the Puerto Rico Board of PRTC's proposed Single Zone Plan would prohibit or have the effect of prohibiting the ability of entities other than PRTC to provide intrastate long distance telecommunications services in Puerto Rico. On its face, Section 253(a) explicitly applies to "intrastate telecommunications service." Consequently, TLD respectfully requests that the Commission issue a declaratory ruling stating that such action by the Puerto Rico Board would be a violation of Section 253(a) and subject to preemption under Section 253(d).

Other consequences of the Single Zone Plan independently support the issuance of a declaratory ruling by the Commission. PRTC's elimination of the intrastate long distance market will likely have a detrimental ripple effect on competition for interstate and international long distance services. The Single Zone Plan also runs afoul of the Act's prohibition against slamming and works to indirectly deny dialing parity and

nondiscriminatory access by denying a competitive carrier the customer base necessary to seek such dialing parity and nondiscriminatory access. Moreover, the bundled nature of the mandatory Single Zone results in an impermissible classic tying arrangement, forcing subscribers of residential local exchange service to pay for island-wide calling as a condition to being able to retain the truly basic residential local exchange service they have had for many years and continue to have today. Finally, the Single Zone Plan is being promoted on the basis that it is sound regulatory philosophy to believe that the higher rates that accompany the Single Zone Plan are a non-issue because increased Lifeline Program funds can be relied upon to offset the rate impact on PRTC's captive residential local exchange service subscribers.

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**PETITION FOR EXPEDITED DECLARATORY RULING**

Pursuant to Sections 1.1 and 1.2 of the Commission's rules,<sup>1</sup> Telefónica Larga Distancia de Puerto Rico, Inc. ("TLD") hereby respectfully requests that the Commission issue a declaratory ruling on an expedited basis stating that approval by the Junta Reglamentadora de Telecomunicaciones de Puerto Rico ("Puerto Rico Board") of the "Single Zone Plan," filed with the Puerto Rico Board by incumbent local exchange carrier Puerto Rico Telephone Company ("PRTC") on April 6, 2005, would violate Section 253(a) ("Section 253(a)") of the Communications Act of 1934, as amended ("Act"),<sup>2</sup> and would therefore be subject to preemption under Section 253(d) of the Act ("Section 253(d)").<sup>3</sup> Alternatively, if the Puerto Rico Board approves the Single Zone Plan (including permitting the Single Zone Plan to go into effect) prior to a ruling on this Petition, TLD requests that the Commission find that approval of the Single Zone Plan is

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<sup>1</sup> 47 C.F.R. §§ 1.1, 1.2.

<sup>2</sup> 47 U.S.C. § 253(a).

<sup>3</sup> *Id.* § 253(d).

preempted under Section 253. In addition, TLD requests that the Commission issue a declaratory ruling in accordance with the arguments presented herein.<sup>4</sup>

As discussed below, approval of the Single Zone Plan by the Puerto Rico Board would eliminate competition in the intrastate telecommunications market in Puerto Rico by *mandating* that consumers of PRTC's monopoly residential local exchange service purchase a bundle of local and intrastate long-distance service, thereby leveraging PRTC's residential local exchange service monopoly into the more competitive intrastate long-distance market and completely eliminating competition in that market.<sup>5</sup> The *mandatory* aspect of the Single Zone Plan also forces consumers to forego the choice of a preferred intra-island long distance service provider and to pay for service they may not need, use, or even want at the level imputed by the Single Zone Plan service options.

Those consumers who want this bundle have had the option of purchasing it from PRTC for more than a year—by subscribing to PRTC's optional islandwide calling plans—but few have chosen to do so. It is not the islandwide calling nature of the Single Zone Plan that offends; but, rather, it is the *mandatory* tie-in inherent in the Single Zone Plan that would represent a *clear step backwards from competition* and leap toward extending PRTC's residential local exchange services monopoly island-wide, in direct violation of Section 253(a).

Section 1.2 of the Commission's rules states that the Commission “may, in accordance with section 5(d) of the Administrative Procedure Act, on a motion or on its own motion issue a declaratory ruling terminating a controversy or removing

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<sup>4</sup> See *infra* at 19-24.

<sup>5</sup> Although Puerto Rico is not a “state,” TLD uses the terms “intrastate” and “intra-island” interchangeably herein simply for ease of reference.

uncertainty.”<sup>6</sup> This Petition requests that the Commission issue a declaratory ruling that approval by the Puerto Rico Board of the Single Zone Plan as filed would violate the substantive provisions of Section 253(a) and would therefore be preempted under Section 253(d). Alternatively, if the Puerto Rico Board approves the Single Zone Plan (including permitting it to become effective) during the pendency of this Petition, TLD requests that such approval be preempted under Section 253. As discussed herein, expedited consideration is appropriate in these circumstances due to the immediate and serious injury to competition that would result if the Single Zone Plan were to go into effect.

In support hereof TLD states as follows.

## **I. BACKGROUND**

### **A. TLD**

TLD is an intrastate, interstate (between Puerto Rico, the U.S. Virgin Islands, and other domestic points), and international (between Puerto Rico, the U.S. Virgin Islands, and international points) carrier. TLD is an indirect subsidiary of Telefonica Internacional S.A. (“TISA”), in turn a wholly owned subsidiary of Telefonica S.A., the Spanish global telecommunications company with communications operations throughout the world. TISA purchased TLD in 1992 from Puerto Rico Telephone Authority, which was also the holding company of PRTC at the time. In 1999, TLD entered the intrastate long distance market after the enactment of the Telecommunications Act of 1996 (“1996 Act”) and Puerto Rico’s Law 213, discussed below. TLD is a competitive provider of long-distance service in Puerto Rico, providing intrastate (intra-island), interstate, and international telecommunications service to both

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<sup>6</sup> 47 C.F.R. § 1.2.



residential and business customers. TLD is a facilities based carrier. Since 1992, TLD has made approximately \$47.5 million in capital expenditures for facilities related to its long-distance service.<sup>7</sup> TLD also provides limited local exchange service to business customers through resale. A significant portion of TLD's overall revenues are derived from providing intrastate (as opposed to interstate or international) long distance service.<sup>8</sup>

## **B. PRTC**

PRTC is Puerto Rico's only incumbent local exchange carrier. Prior to 1996, PRTC, then wholly owned by the government of Puerto Rico, provided all wireline telephone service throughout Puerto Rico, including residential local exchange service, business local exchange service, payphones, directory assistance, operator service, and long distance service. It was an unregulated monopoly with prices set pursuant to shifting non-regulatory considerations. There was no rate regulation at all, and rates underwent no cost or other regulatory scrutiny. Indeed, there was a statutory prohibition against telecommunications competition. In 1999, the government of Puerto Rico sold a significant share of PRTC to GTE, and, currently, Verizon Communications, Inc. owns 52% of PRTC. The government of Puerto Rico still owns 28% and thus has a very significant economic interest in the value of PRTC.<sup>9</sup> The remaining 20% of PRTC is divided between employees of PRTC (7%) and a Puerto Rico-based bank (13%).

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<sup>7</sup> See Angulo Decl. ¶ 3, at Exhibit A hereto.

<sup>8</sup> *Id.* ¶ 4.

<sup>9</sup> This year, while the Puerto Rico Board has been considering the Single Zone Plan, newspaper reports have surfaced indicating that the government of Puerto Rico may seek to sell its interest in PRTC in 2006, giving the government added incentive to take steps to protect if not enhance the value of PRTC. See, e.g., Michelle Kantrow Vazquez, *Selling PRT shares on open market is one option for government*, San Juan Journal, June 1, 2005, at 4; Yanira Hernández Cabiya, *Posible venta de acciones*, El Nuevo Día, June 1, 2005, at 115. These articles are attached hereto as Exhibit B.

As Puerto Rico's incumbent local exchange carrier, PRTC currently provides residential local exchange service to virtually all of the Puerto Rico market and is the dominant provider of business local exchange service and access service. In addition, PRTC is also the dominant provider in the intrastate long distance services market as well as the interstate and international long distance service markets.<sup>10</sup> The breathtaking extent of PRTC's control over the local market recently was described by PRTC to the Commission. In a March 29, 2005 letter to the Wireline Competition Bureau, PRTC confirmed that it has virtually no competitors in Puerto Rico:

[PRTC] is the only incumbent local exchange carrier in Puerto Rico. Although total subscribership data from all carriers on the island are not available, the percentage of subscribers that [PRTC] serves—70 percent as compared to a national average of penetration total of 94.2 percent—is likely very close to total subscribership on the island.

Based on the conditions in Puerto Rico, it is highly unlikely that more than a very small percentage of households subscribe to a wireline or wireless competitive carrier in place of [PRTC]. This is based on the fact that the areas in which [PRTC]'s subscribership levels are particularly low—those areas requiring network build-out and low-income residential and rural communities—are also areas in which competitors, wireline and wireless, lack facilities.

[PRTC]'s sole major facilities-based wireline competitor is focused on the business market and new commercial and residential development. Likewise, wireless carriers, including [PRTC]'s affiliated wireless provider, have the same difficulties as [PRTC] does serving remote areas—due to the lack of basic infrastructure and the inhospitable terrain on the island. Further, consistent with conditions on

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<sup>10</sup> See Angulo Decl. ¶¶ 4-5, at Exhibit A hereto.

the mainland, wireless service remains largely a complementary service in Puerto Rico.<sup>11</sup>

A copy of the March 29, 2005 letter is attached hereto as Exhibit C.

**C. Law 213 and the Puerto Rico Board**

In response to the enactment of the Telecommunications Act of 1996 (“1996 Act”), the Puerto Rico legislature enacted the Puerto Rico Telecommunications Act, Law 213 of September 12, 1996 (“Law 213”).<sup>12</sup> Law 213 created the Puerto Rico Board, which, subject to the authority conferred and limitations imposed by Law 213, regulates telecommunication services within Puerto Rico. The Puerto Rico Board is entrusted with, among other things, the obligation to promote competition, promote interconnection, and remove regulatory barriers or unnecessary administrative procedures which may hamper competition in the market. The government of Puerto Rico appoints the three members of the Puerto Rico Board.

**D. PRTC’S Mandatory, Bundled Service Single Zone Plan**

In 2003, after a prolonged proceeding, the Puerto Rico Board ordered a phased-in lowering of PRTC’s extraordinarily lucrative intra-island access rate from more than nine cents per minute (in effect as recently as last year) to just over two cents per minute, commencing in April 2005. Not coincidentally, on April 6, 2005, PRTC filed, as a tariff

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<sup>11</sup> Letter from Nancy J. Victory of Wiley, Rein & Fielding LLP, on behalf of PRTC, to Jeffrey Carlisle, Chief, Wireline Competition Bureau, at 1-2, CC Docket No. 96-45 (March 29, 2005), attached hereto at Exhibit C.

Considerable information regarding the current structure of telecommunications markets in Puerto Rico has been developed in discovery and in the record before the Puerto Rico Board in Docket Nos. JRT-2005-Q-0121, *et al.*, however, such information is subject to a Non-Disclosure Agreement (“NDA”) between TLD and PRTC. TLD is willing to waive its rights under the NDA in order to bring market share information before the Commission and requests that the Commission urge PRTC to do the same.

<sup>12</sup> Law 213 is appended at Exhibit G hereto.

revision, its "Single Zone Plan" for local exchange and intrastate service in Puerto Rico. A copy of the tariff pages from this filing is attached hereto as Exhibit D.

Fundamentally, the Single Zone Plan consists of three independent proposals. First, the Single Zone Plan eliminates local calling areas within the island of Puerto Rico, making the entire island one local calling area by requiring all of PRTC's local exchange subscribers to subscribe to one of two Single Zone Plans, each of which contains a mandatory bundle of local exchange service and intrastate long distance service.<sup>13</sup> Second, it rebalances PRTC's residential and business local exchange services rates by raising residential rates and reducing business rates.<sup>14</sup> Third, it changes PRTC's residential local exchange service rate scales.<sup>15</sup>

The Single Zone Plan is pending before the Puerto Rico Board. The effective date for the Single Zone Plan was originally July 2005; however, reminded by TLD and others of PRTC's commitment in another proceeding not to raise residential rates before January 2006, the effective date was extended.<sup>16</sup> Hearings on the Single Zone Plan are

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<sup>13</sup> See PRTC Local Tariff, proposed §§ 15.2.1, 15.2.2, at Exhibit D hereto; Angulo Decl. ¶ 6, at Exhibit A hereto.

Currently, there are 10 local calling areas in Puerto Rico. In 2004, PRTC successfully reduced the number of local calling areas from 68 to 10. Intrastate long distance usage has, of course, already decreased as a result of this reduction in the number of local calling areas. Competition in the intra-island long distance service market has had to adjust. Under the Single Zone Plan the number of local calling areas would be reduced from 10 to 1 and competition would be eliminated altogether.

<sup>14</sup> See PRTC Local Tariff, proposed §§ 15.2.1, 15.2.2, at Exhibit D hereto.

<sup>15</sup> See *id.*

<sup>16</sup> This commitment is reflected in a November 7, 2003 letter agreement privately negotiated between the Puerto Rico Board and PRTC which contains, as part of a settlement of the proceeding concerning PRTC's intra-island access rates, PRTC's agreement not to increase residential rates prior to January 2006.

currently scheduled for February 6–8, 2006, and a decision is scheduled for March 6, 2006.<sup>17</sup>

## **II. ARGUMENT**

### **A. Summary of Argument**

Approval of the Single Zone Plan by the Puerto Rico Board will result in the elimination of the intrastate telecommunications market in Puerto Rico. It is a simple syllogism. One, virtually all subscribers to residential local exchange service in Puerto Rico are subscribers to PRTC's residential local exchange service. Two, under the Single Zone Plan, all subscribers to PRTC's residential local exchange service will be required to purchase bundled local and intrastate long distance service from PRTC. Three, with virtually all subscribers to residential local exchange services committed to PRTC's mandatory bundled package, there will be no demand for intrastate long distance service from other providers, resulting in the elimination of competition in the intrastate long distance service market in Puerto Rico and, therefore, the elimination of intrastate long distance service in Puerto Rico.

By imposing a mandatory single calling zone subscription requirement and thereby eliminating local calling areas within Puerto Rico, the Single Zone Plan would force PRTC's local exchange customers to subscribe to what is in effect a bundled package of local and intrastate long distance services. Having had its access rate reduced from nine to two cents per minute, PRTC's response to the lost windfall is to simply close down the intrastate market by eliminating all competition, keep all intrastate

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<sup>17</sup> Although the Puerto Rico Board has indicated informally that the Single Zone Plan will not go into effect until the March 6, 2006 decision, as of the date of this filing, no formal order has been issued. Thus, as of the date of this filing, the effective date of the Single Zone Plan remains January 6, 2006.

revenues for itself, and use them to subsidize unrelated components of PRTC's Single Zone Plan. By eliminating competition in the intrastate long distance market, co-opting all users of competitive intra-island long distance service and pocketing all of the revenues for that service, PRTC has stated that the Single Zone Plan is "revenue neutral" with respect to the totality of PRTC's services. It is apparent that with the Single Zone Plan intends to make the intra-island long distance market a victim in the process.

Thus, approval by the Puerto Rico Board of PRTC's proposed Single Zone Plan would prohibit or have the effect of prohibiting the ability of entities other than PRTC to provide intrastate long distance telecommunications services in Puerto Rico.<sup>18</sup> On its face, Section 253(a) explicitly applies to "intrastate telecommunications service." Consequently, TLD respectfully requests that the Commission issue a declaratory ruling stating that such action by the Puerto Rico Board would be a violation of Section 253(a) and subject to preemption under Section 253(d), as set forth below.

**B. The Telecommunications Act of 1996 Mandates Competition in Intrastate Markets**

The 1996 Act was intended to foster competition in *all* markets, end monopolies in local telephone service, and promote local telephone service competition.<sup>19</sup> The

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<sup>18</sup> The Single Zone Plan would increase residential telephone service rates to cover the bundling of intrastate long distance service with local exchange service, with the effect of forcing a significant number of PRTC's captive residential local exchange service subscribers to pay for intrastate long distance service which they do not need, want or use at the levels imputed in the Single Zone Plan rates. It would also effectively deprive the residential local exchange service consumers of the ability to choose their preferred intrastate long distance service provider and, as a practical matter, unduly bias in favor of PRTC their choice of provider of interstate and international long distance services.

<sup>19</sup> See H.R. Conf. Rep. No. 104-458, at 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 124 (stating that the Act "provide[s] for a procompetitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced

legislative history of the 1996 Act indicates that Congress sought to establish “a pro-competitive, deregulatory national policy framework” for the U.S. telecommunications industry.<sup>20</sup> As the U.S. Supreme Court noted, in carrying out this overarching objective, the 1996 Act “fundamentally restructures local telephone markets, ending the monopolies that States historically granted to local exchange carriers (LECs) and subjecting incumbent LECs to a host of duties intended to facilitate market entry.”<sup>21</sup>

Moreover, Congress indicated that telecommunications consumers were intended to be the primary beneficiaries of such sweeping deregulation. The preamble of the Act emphasizes that it was intended to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies [to consumers].”<sup>22</sup> The House Report issued by the Commerce Committee similarly stated that the Act was intended to result in “lower prices to consumers and business” and “greater choice of services” and expresses the Committee’s belief that competition “will benefit all consumers.”<sup>23</sup>

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telecommunications and information technologies and services to *all* Americans by opening *all telecommunications markets* to competition...” (italics added); *GTE South, Inc. v. Morrison*, 957 F. Supp. 800, 801 (E.D. Va. 1997); *AT&T Commc’ns of the Sw., Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 585 (N.D. Tex.1998), *vacated in part on other grounds*, 243 F.3d 928 (5th Cir. 2001). See also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15505 (1996) (stating that one of the principal goals of the telephony provisions of the Act is to open the local exchange and exchange access markets to competition).

<sup>20</sup> S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., 1 (1996).

<sup>21</sup> *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 367 (1998).

<sup>22</sup> Pub. L. No. 104-104, 110 Stat. 56, 56 (1996).

<sup>23</sup> H.R. Rep. No. 204, 104th Cong., 1st Sess., 47-50, *reprinted in* U.S. Code Cong. & Ad. News, 10-11 (March 1996).

The Commission has reiterated this consumer focus in subsequent rulemakings on the Act. It has stated that a general principle underlying the 1996 Act is that making telecommunications markets competitive will “bring new packages of services, lower prices and increased innovation” to consumers.<sup>24</sup>

**C. Puerto Rico Board Approval of the Single Zone Plan Would Violate Section 253(a).**

**1. The Single Zone Plan Violates Section 253(a) Because It Has the Effect of Prohibiting the Ability of TLP and Others to Provide Intrastate Telecommunications Service in Puerto Rico.**

Section 253(a) states:

No State<sup>25</sup> or local statute or regulation, or other State or local legal requirement, may *prohibit or have the effect of prohibiting* the ability of any entity to provide any interstate or *intrastate* telecommunications service.<sup>26</sup>

Because the Commission and reviewing courts have recognized that enforcement of Section 253 is essential to implementation of the pro-competitive goals of the 1996 Act, they have construed these provisions broadly. The Commission has stated:

[U]ntil passage of the 1996 Act, states could and did award monopoly status to certain firms to provide service in prescribed areas within the state. Pursuant to section 253, such state actions are no longer permissible. Through this provision, Congress sought to ensure that its national competition policy for the telecommunications industry would indeed be the law of the land and could not be frustrated by the isolated actions of individual municipal authorities or states. . . .<sup>27</sup>

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<sup>24</sup> See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15506 (1996).

<sup>25</sup> The term “State” includes Puerto Rico. See 47 U.S.C. § 153(40).

<sup>26</sup> 47 U.S.C. § 253(a) (*italics added*).

<sup>27</sup> *In re Pub. Util. Comm’n of Tex.*, 13 FCC Rcd 3460, 3463 (1997).



The Commission has determined that the term “legal requirement” with respect to state action is to be construed quite broadly:

We conclude that Congress intended that the phrase, “State or local statute or regulation, or other State or local legal requirement” in section 253(a) be interpreted broadly. The fact that Congress included the term “other legal requirements” within the scope of section 253(a) recognizes that State and local barriers to entry could come from sources *other than statutes and regulations*. The use of this language also indicates that section 253(a) was meant to capture a broad range of state and local actions that prohibit or have the effect of prohibiting entities from providing telecommunications services. We believe that interpreting the term “legal requirement” broadly, best fulfills Congress’ desire to ensure that states and localities do not thwart the development of competition. Our conclusion, that Congress intended this language to be interpreted broadly, is reinforced by the scope of section 253(d). Section 253(d) directs the Commission to preempt any statute, regulation, or legal requirement permitted or imposed by a state or local government if it contravenes sections 253(a) or (b). A more restrictive interpretation of the term “other legal requirements” easily could permit state and local restrictions on competition to escape preemption based *solely on the way in which action was structured*. We do not believe that Congress intended this result.<sup>28</sup>

The Commission has held that state commission approval of a tariff provision constitutes a “legal requirement” for purposes of Section 253.<sup>29</sup>

The breadth of section 253 is also apparent in its reference not only to state actions that prohibit an entity from providing telecommunication services, but also to those which “have the effect of prohibiting” the provision of such telecommunication

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<sup>28</sup> *In re Minnesota*, 14 FCC Rcd 21697, 21707 (1999) (citations omitted) (italics added).

<sup>29</sup> *See In re Pub. Utils. Comm’n of Tex.*, 13 FCC Rcd 3460, 3561 (1997); *accord Choice One Commc’ns of Pa., Inc.*, 2002 WL 971920 at \*3 (Pa. P.U.C. 2002).

services.<sup>30</sup> The Commission and reviewing courts have held that in order to determine whether an ordinance has the effect of prohibiting the provision of telecommunications services, they must consider whether the action “*materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.*”<sup>31</sup> Courts applying section 253(a) have found that certain features of regulations, in combination, have the effect of prohibiting the provision of telecommunications services: numerous submission or disclosure requirements, the retention of discretion by a city to require further disclosures, the failure to comply with public hearing requirements, the granting of unlimited discretion to a city or state to grant or deny permits, and the imposition of civil and/or criminal penalties.<sup>32</sup>

Most significantly, the Commission has emphasized that “Section 253(a), at the very least, proscribes State and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular State or locality.”<sup>33</sup> In *Silver Star*, for example, a Wyoming’s rural incumbent protection provision gave incumbent LECs with 30,000 or fewer access lines the ability to block the grant of Certificate of

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<sup>30</sup> 47 U.S.C. § 253(a).

<sup>31</sup> See, e.g., *In re Pittencrieff Commc’ns, Inc.*, 13 FCC Rcd 1735, 1751 (1997). See *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 77 (2d Cir.2002); *Montgomery Co., Md. v. Metromedia Fiber Network, Inc.*, 326 B.R. 483, 492 (S.D.N.Y. 2005); *Qwest Commc’ns Corp. v. City of Berkeley*, 208 F.R.D. 288, 294 (N.D. Cal. 2002); *Cal. Payphone Ass’n*, 12 F.C.C.R. 14191, 1997 WL 400726, at ¶ 31 (1997).

<sup>32</sup> See, e.g., *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir.2004); *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1175-77 (9th Cir. 2001); *Cox Commc’ns PCS, L.P. v. City of San Marcos*, 204 F.Supp.2d 1260 (S.D. Cal. 2002); *Qwest Commc’ns Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081 (N.D. Cal. 2001).

<sup>33</sup> *In re Silver Star Tel. Co.*, 12 FCC Rcd 15639, 15656 (1997); *In re Classic Tel., Inc.*, 11 FCC Rcd 13082, 12095 (1996).

Public Convenience and Necessity applications of potential competitors.<sup>34</sup> Similarly, in *Classic Telephone*, a Kansas municipality denied a telecommunication provider's franchise request to serve area customers because it "did not want to see two telephone companies in Hill City, competing side by side, in a situation that [would] be financially uneconomic for either company."<sup>35</sup> In both cases the Commission held that the cities' application of these regulatory requirements prevented the plaintiffs from providing telecommunications service and therefore violated Section 253(a).<sup>36</sup> In so ruling, the Commission focused in particular on Congress' intent that states implement the 1996 Act in a manner consistent with its overarching pro-competitive goals.

The Commission stated in *Silver Star* that "Congress intended primarily for competitive markets to determine which entrants shall provide the telecommunications services demanded by consumers. The express preemption authority granted to the Commission under Section 253 is designed to ensure that State and local governments implement the 1996 Act in a manner consistent with these goals."<sup>37</sup> The Commission similarly declared in *Classic Telephone* that "the prohibition on competitive entry against a particular class of potential competitors is inconsistent with the pro-competitive policies of the 1996 Act and violates section 253(a)."<sup>38</sup>

Approval of the Single Zone Plan by the Puerto Rico Board could not more cleanly fit into the category of action prohibited by Section 253(a). Due to the mandatory nature of the proposed Single Zone Plan, all customers subscribing to local service with

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<sup>34</sup> See *Silver Star*, 12 FCC Rcd at 15656 (1997).

<sup>35</sup> *Classic Tel.*, 11 FCC Rcd at 13096 (1996).

<sup>36</sup> *Silver Star*, 12 FCC Rcd at 15661; *Classic Tel.*, 11 FCC Rcd 13082 at 13108.

<sup>37</sup> *Silver Star*, 12 FCC Rcd at 15657.

<sup>38</sup> *Classic Tel.*, 11 FCC Rcd at 13096-97.

PRTC will be required to use PRTC for *all* intrastate calling. No subscriber would pay another telecommunications provider for intrastate service when the subscriber has already been forced to pay PRTC for such service. Because PRTC provides local service to almost 100% of residential local exchange service subscribers and is dominant with respect to business subscribers, the mandatory requirement would all but eliminate the provision of residential intrastate long distance service by competitors of PRTC and severely impair the competitive provision of business intrastate long distance service.<sup>39</sup> PRTC would be able to leverage its significant market power in the local market to eliminate competitors in the intrastate long distance market—the one Puerto Rico telecommunications market in which PRTC has faced any significant competition since the passage of the 1996 Act. Approval of the Single Zone Plan would therefore directly conflict with the Congressional mandate of the 1996 Act.

Approval of a **mandatory** single state-wide calling area is unprecedented. The few times such a plan has been proposed elsewhere, it was rejected as anticompetitive. A proposal to create a single statewide local calling zone in Delaware was rejected by the Delaware Public Service Commission in 1993.<sup>40</sup> In doing so, the Delaware Commission stated “if we wish to encourage competition in the intrastate toll market, we should forego statewide local calling.”<sup>41</sup> The Delaware Commission observed that “it will eliminate all competition for intrastate toll service”<sup>42</sup> whereas “continuing intrastate

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<sup>39</sup> See Angulo Decl. ¶¶ 8-9, at Exhibit A hereto.

<sup>40</sup> See *In re Diamond State Tel. Co.*, 1993 Del. PSC LEXIS 22.

<sup>41</sup> *Id.* at \*83.

<sup>42</sup> *Id.* at \*82.

competition will ultimately lead to lower intrastate toll rates.”<sup>43</sup> Even the Delaware ILEC, Diamond State Telephone Company—now Verizon, the majority owner of PRTC—considered such a scheme “objectionable” and observed that a state-wide local calling area would “result in a higher local calling rate for all of its customers, even though some customers would prefer to pay less money for a smaller local calling area.”<sup>44</sup> Similarly, the Vermont Public Service Board rejected a statewide local calling zone, noting that it was likely to shift costs from those who use toll services to those who do not, and would eliminate “both originating and terminating access for those calls too and effectively eliminating toll as a service.”<sup>45</sup>

It bears emphasizing that the Single Zone Plan is not just a proposal to implement a statewide local calling area. It is far worse. It is a proposal to implement a *mandatory* statewide local calling area. Like many if not all other incumbent local exchange carriers throughout the United States, PRTC already offers an *optional* statewide local calling service plan. The Single Zone Plan is a mandatory version of several single-zone plans that PRTC already offers to its local exchange customers as an alternative to “pure” local exchange service.<sup>46</sup> Under its current “Puerto Rico Ilimitado Calling Plan” and several other combination plans, customers can elect to subscribe to a single-zone plan to avoid additional toll charges for intrastate calling. The difference between PRTC’s current Puerto Rico Ilimitado Calling Plan and the proposed Single Zone Plan is that the latter would be *mandatory* for all local exchange customers if approved by the Puerto Rico

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at \*82-\*83.

<sup>45</sup> *Petition of Global NAPs, Inc.*, 2002 Vt. PUC LEXIS 272 at \*33 n.43.

<sup>46</sup> *See* Angulo Decl. ¶ 7, at Exhibit A hereto.

Board. Currently, subscribers can choose the Puerto Rico Ilimitado Calling Plan as an alternative to traditional local exchange service or they can choose a preferred intrastate long distance service provider other than PRTC. Under the proposed Single Zone Plan, PRTC residential local exchange service customers will also be obligated to take intrastate long distance service from PRTC. This is because—unlike the situation in many other states—PRTC retains a monopoly in the residential local exchange services market. In order to obtain the most basic of telephone services—local exchange service—a Puerto Rico consumer will be required to pay PRTC for intra-island long distance service. Because they are forced to take all-island coverage from PRTC, they will not have a choice as to intrastate long-distance providers, and many will be forced to pay for a service they do not want, need, or use.

Indeed, any entity that would wish to compete with PRTC in providing intrastate long distance service in Puerto Rico would also have to provide a bundled package of services that include both local *and* intrastate long distance service. Practically speaking, this is an almost insurmountable barrier to entry. First, if the Single Zone Plan is permitted to go into effect, all local exchange customers of PRTC will be promptly switched to one of the two Single Zone Plans under the Proposed Tariff.<sup>47</sup> At the first opportunity, those customers will discontinue intrastate service with TLD and other intrastate service providers because those customers would already be paying PRTC for such service. Almost overnight, TLD and other intrastate providers will lose all of their intrastate long distance customers.<sup>48</sup> Even assuming local exchange competition against

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<sup>47</sup> See Angulo Decl. ¶ 8 & Attach. 2, at Exhibit A hereto; *see also* PRTC Local Tariff, proposed § 15.2.1(C), at Exhibit D hereto.

<sup>48</sup> See Angulo Decl. ¶ 8, at Exhibit A hereto.

the monopoly were feasible and economical, TLD and others will have no intrastate customer base or revenue during the period it would take to establish a presence in the local exchange market.

Moreover, TLD cannot rely on providing intrastate service to customers of competitive local exchange carriers. According to the 2005 Local Competition Report, almost 10 years after the passage of the 1996 Act, there is only *one* facilities-based competitive local exchange carrier of any size in Puerto Rico.<sup>49</sup> However, this carrier only provides service to business customers and only competes in 20% of the zip code areas on the island.<sup>50</sup> Therefore, the timetable for getting established in the local exchange market could be protracted. There is scant opportunity to provide intrastate service to business customers, much less to the residential market in which PRTC has a monopoly.

Finally, there should be no reason that a telecommunications service provider that provides service in one market—here the intrastate market—should be required to enter another market—the local exchange market—to continue operating its core business due to distortions in the market. However, if the Puerto Rico Board were to allow the mandatory, bundled-service Single Zone Plan to be implemented, TLP and other intrastate service providers would be required to do just that.

The Single Zone Plan would be a giant step back from competition and towards the dark days of an island-wide PRTC monopoly. First, the mandatory nature of the plan allows PRTC to leverage its current monopoly in the residential local exchange services

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<sup>49</sup> See *Local Telephone Competition: Status as of December 31, 2004* at Table 12 (July 2005), attached hereto as Exhibit E.

<sup>50</sup> See *id.* at Table 16; Letter from N. Victory to J. Carlisle, at 1, attached hereto as Exhibit C.

market and bring intrastate long distances services under cover of its residential local exchange services monopoly. This eliminates the intrastate long distance service market which is the only telecommunications market in Puerto Rico which has begun to develop facilities-based competition. Second, PRTC's access to a new stream of revenue from residential local exchange customers that are currently subscribers of competitive intrastate long distance services or, for that matter, do not even use intrastate long distance services, will allow PRTC to cross-subsidize the proposed reductions in business local exchange service rates with increases in residential local exchange service rates that are insulated from competition. This enables PRTC to use its new revenue stream from higher residential prices, including the additional revenues that residential customers would have paid to intrastate long-distance competitors, to squeeze its competition in the business local exchange services market to further extend its island-wide monopoly.

**2. Other Consequences of The Single Zone Plan Justify the Requested Declaratory Ruling.**

Elimination of the intrastate long distance market will likely have a detrimental ripple effect on competition in other long distance services. PRTC is already a monopolist with respect to residential local exchange service, and is a dominant carrier with respect to business local exchange service, intrastate toll service and interstate and international long distance service. Because of the mandatory nature of the Single Zone Plan, its approval would hand back to PRTC the monopoly in intrastate toll service. This would be a step backward for competition in Puerto Rico. Having the monopoly in the local and intrastate markets will give PRTC unfair advantage in the interstate and international long distance markets. TLD's own market research indicates that the great majority of consumers in Puerto Rico use the same carrier for on-island and off-island



long distance services. Because intrastate toll service will already be bundled with local service, subscribers will be less likely to seek out different providers for such services as interstate and international long distance service. As a result, competition in interstate and international long distance services to/from Puerto Rico will be adversely affected.

Additionally, Section 258 of the Act<sup>51</sup> prohibits the practice of “slamming,” which is defined as the submission or execution of an unauthorized change in a subscriber’s selection of a provider of telephone exchange service or telephone toll service.<sup>52</sup> The Commission has adopted rules requiring that a carrier receive individual subscriber consent before a carrier change may occur.<sup>53</sup> Pursuant to Section 258, carriers are barred from changing a customer’s preferred local or long distance carrier without first complying with one of the Commission’s four verification procedures. However, the Single Zone Plan does just that: local exchange customers who use providers other than PRTC for intrastate service will be switched to PRTC in violation of Section 258 without their consent. To the extent that a selection of a service option under the Single Zone Plan by PRTC’s residential local exchange service subscribers might be seen as a “consent” to switching providers of intra-island long distance service, TLD submits that, given the lack of choice afforded those subscribers, a selection of one of two Single Zone Plan service options—each of which is a mandatory bundle of local and long distance services—is hardly consensual. Moreover, PRTC has indicated that the implementation of the Single Zone Plan is contemplated as immediate on the effective date and that its residential local exchange service subscribers who have not chosen a service option as of

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<sup>51</sup> 47 U.S.C. § 258.

<sup>52</sup> 47 U.S.C. § 258(a).

<sup>53</sup> See 47 CFR § 64.1120.